MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 8)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-23-52 OF 1996
KAMALANATHAN RATNAM J
30 MARCH 1998

Civil Procedure *— Judge — Application to discharge — No allegation of actual bias — Whether judge had pre-judge issue in earlier application — Whether fair trial of action before the same judge would no longer be possible — Whether there is an appearance of bias — Whether delay in application was inordinate — Whether there was sufficient reason to require judge to withdraw from the case*

The partners of the second defendant ('the partners') applied for the presiding High Court judge to discharge himself from hearing and trying all further proceedings in the action including the trial thereof. The judge had on 15 December 1997 dismissed an application by the partners for an order that a preliminary question of law be tried ('the decision') (see [1998] 3 MLJ 226). The second defendant — whilst contending that there is no allegation of actual bias whatsoever against the judge — submitted that the judge had in the decision made a pre-judgment of the most pivotal issue affecting the second defendant and having decided so at a stage when not called upon to do so, there would be a reasonable suspicion of, or alternatively a real likelihood that a fair trial of the action before the judge would no longer be possible and that therefore there is the appearance of, though not actual, bias. The plaintiffs argued that the very fact that the application was made more than three months after the judge had delivered judgment, constituted inordinate delay and that it was made in bad faith.

Held, dismissing the application with costs:

(1) The delay was clearly inordinate. If the second defendant and the partners were of the view, as soon as the decision was delivered on 15 December 1997, that a fair-minded bystander sitting in the court would form the opinion of a likelihood of bias, then the application ought to have been filed with promptitude. The very fact that the second defendant had toyed with the idea of filing the application itself shows that it lacked bona fide (see pp 235I and 236A–B).

(2) Each case of alleged bias calling for a disqualification of a judge must depend on the facts relevant to each case. This claim of likelihood of bias emanated from the second defendant's belief that it was right in the opinion it held with regard to the interpretation of the decision. But that opinion was in question. This, therefore, was not enough to require that the judge withdraw from the case. Where the reason for requiring the disqualification itself is in contest, then such an application to disqualify the judge must be rejected (see p 236G–I).

A **[Bahasa Malaysia summary**

Pekongsi-pekongsi defendan kedua ('pekongsi-pekongsi') telah memohon agar hakim Mahkamah Tinggi yang bersidang menarik diri daripada mendengar dan membicarakan semua prosiding lanjut dalam tindakan termasuk perbicaraannya. Pada 15 Disember 1997, hakim telah menolak satu permohonan oleh pekongsi-pekongsi untuk satu perintah bahawa satu persoalan undang-undang permulaan dibicarakan ('keputusan tersebut') (lihat [1998] 3 MLJ 226). Defendan kedua — yang berhujah bahawa tiada pengataan tentang kecenderungan berat sebelah sebenar sama sekali terhadap hakim — menghujahkan bahawa dalam keputusan tersebut hakim telah membuat pra-penghakiman ke atas isu paling utama yang menjejaskan defendan kedua dan selepas mengambil keputusan di peringkat di mana tidak dikehendaki berbuat demikian, akan terdapat kecurigaan yang munasabah, atau secara alternatif kebarangkalian yang benar bahawa perbicaraan adil tindakan di hadapan hakim tidak lagi mungkin dan maka akan kelihatan kecenderungan berat sebelah walaupun bukan kecenderungan sebenar. Plaintif-plaintif menghujahkan bahawa hakikat bahawa permohonan telah dibuat lebih tiga bulan selepas hakim menyampaikan keputusan, merupakan kelewatan terlampau dan bahawa ia dibuat dengan tidak suci hati.

Diputuskan, menolak permohonan dengan kos:

(1) Kelewatan itu jelas terlampau. Andainya defendan kedua dan pekongsi-pekongsi berpandangan, sebaik sahaja keputusan disampaikan pada 15 Disember 1997, bahawa seorang biasa yang munasabah yang duduk di mahkamah akan berpendapat kebarangkalian kecenderungan, maka permohonan sepatutnya difailkan dengan secepat mungkin. Hakikat bahawa defendan kedua telah memikirkan idea memfailkan permohonan sendiri menunjukkan bahawa ia kekurangan bona fide (lihat ms 235I dan 236G–I).

(2) Setiap kes mengenai kecenderungan berat sebelah yang dikatakan yang memohon penyingkiran seseorang hakim mestilah bergantung pada fakta-fakta yang relevan kepada setiap kes. Tuntutan tentang kebarangkalian kecenderungan berat sebelah ini timbul daripada kepercayaan defendan kedua bahawa adalah betul dalam pendapat yang dipegangnya berhubung dengan tafsiran keputusan. Akan tetapi pendapat itu dipersoalkan. Maka ini tidak mencukupi bagi menghendaki bahawa hakim menarik diri daripada kes. Di mana alasan untuk menghendaki penyingkiran sendiri dipertikaikan, maka permohonan sedemikian untuk menyingkir hakim mestilah ditolak (lihat ms 236G–I).]

Cases referred to

Bainton v Rajski (1992) 29 NSWLR 539 (refd)

R v Australian Stevedoring Industry Board & Anor (1953) 88 CLR 100 (refd)

Legislation referred to

Partnership Act 1961 ss 7–12

Cecil Abraham (*RS Nathan* and *G Rajasingam* with him) for the second defendant/applicant other than Ranita Hussein, K Anantham and Tommy Thomas.

Raja Aziz Addruse (*Darryl Goon* with him) (*Raja Darryl & Loh*) for the first defendant and as a partner of the second defendant.

Pores Royan (*Eugene Jayaraj* with him) (*N Navaratnam & Co*) for K Ananatham, a partner of the second defendant.

VK Lingam (*V Sivaparanjothi* and *R Thayalan* wth him) (*V Siva & Partners*) for the plaintiffs/respondents.

Cur Adv Vult

Kamalanathan Ratnam J:

The application

This is yet another application by the partners of the second defendant, other than Dato' Ranita Hussein, K Anantham and Tommy Thomas for the following orders:

(1) that the Honourable Mr Justice Dato' Kamalanathan Ratnam be at liberty to discharge himself from hearing and trying all further proceedings in this action including the trial thereof;

(2) alternatively, that the Honourable Mr Justice Dato' Kamalanathan Ratnam be required to discharge himself from hearing and trying all further proceedings in this action including the trial thereof;

(3) that the costs of this application herein be provided for in such manner as this Honourable court deems just;

(4) such further or other order or relief as the court may deem fit.

Court's findings

In support of this application, one Chin Yoong Chong affirmed an affidavit on his behalf, and on behalf of the other partners of the second defendant save for the exceptions referred to in the application. The second defendant contended that on 15 December 1997, I had dismissed an application by the partners of the second defendant save for the exceptions stated earlier for an order that a preliminary question of law be tried, pursuant to O 33 r 2 of the Rules of the High Court 1980 (see [1998] 3 MLJ 226). The second defendant relied on the passage which I had referred to in my seventh judgment in this case and also delivered today. It was the case of the second defendant that by 'finding that the alleged defamatory words spoken and published by the first defendant are both intrinsically and inextricably linked and knotted with the second defendant's ordinary course of business so much so that the first defendant and the second

defendant are to my mind joint and several defendants to this action', I had effectively decided on the only substantive defence of the partners under ss 7 and 12 of the Partnership Act 1961 without a trial.

Whilst contending that there is 'no actual allegation of actual bias whatsoever against' me and whilst repeating the intention of the partners to stress that fact and to disclaim any such suggestion, the second defendant argued that on the principle that justice must not only be done but also be seen to be done, it was the opinion of the partners that to an impartial and reasonable and fair-minded bystander with knowledge of the relevant facts, by me having made what the partners viewed was in effect a pre-judgment of the most pivotal issue affecting the second defendant and having decided so at a stage when not called upon to do so, there would be a reasonable suspicion of, or alternatively a real likelihood that a fair trial of this action before me would no longer be possible and that therefore there is the appearance of, though not actual, bias, however much I may judiciously strive to avoid it.

In my seventh judgment which dealt with an application for a stay of all proceedings including my case management, I had categorically stated:

> ... that I had made no finding or conclusion in respect of the second defendant's defences based on ss 7 and 12 of the Partnership Act 1961. I had, in all clarity, left open for determination at the full trial of this action, the question of the liability of the partners.

In the light of this express pronouncement, the fear of the partners of the second defendant that a fair-minded bystander might be of the opinion that there would be a likelihood of bias is no longer likely.

Delay in filing this application

The plaintiffs argued that the very fact that this application was made more than three months after I had delivered judgment on 15 December 1997, constituted inordinate delay and that it was made in bad faith and that this application was contrived to delay and/or prolong the trial of this action. In response to this allegation of delay, the same Chin Yoong Chong affirmed an affidavit in reply (encl 84). He explained that an application to disqualify a judge is never to be made lightly. In this case, the second defendant had to seek leading counsel's advice. Thereafter, consideration had to be given to various aspects of the matter before they arrived at a decision to instruct solicitors to prepare the draft papers for the application. Care, he said, had to be taken as this was a delicate matter.

In my view, this delay is clearly inordinate. If the second defendant and the partners were of the view, as soon as the judgment was delivered on 15 December 1997, that a fair-minded bystander sitting in my court would form the opinion of a likelihood of bias, then this application ought to have been filed with promptitude. In fact, after I had delivered the judgment I had conducted two different case managements of this case spread over three months. Not once during any one of these two case management dates did the second defendant through its counsel, indicate

its intention to make this application. On the contrary, the second defendant and the partners agreed and did abide by this court's directions. The question of the situation being delicate ought not to have arisen at all. Counsel should move without fear or favour, and honourably in the exercise of his client's rights. The very fact that the second defendant had toyed with the idea of filing this application itself shows that it lacks bona fide.

Further, authorities cited to me by counsel suggest that the test to be applied is the reasonable suspicion test, or the reasonable likelihood of bias test, or the real danger test. To my mind, it matters not which of the three tests as gleaned from the authorities submitted, ought to apply. Firstly, the very fact that leading counsel's advice had to be sought clearly suggests to my mind that it was not the fair-minded person sitting unobstrusively in a quiet corner of my court on whom any one of these three tests ought to be applied, but that the test was indeed applied upon a leading counsel who was presumably paid a fee for the advice he gave. He is therefore far from being fair-minded or impartial. Surely there can be no other reason to get leading counsel's advice; it could not be with regard to the format of the application nor the contents of the supporting affidavit. Counsel who are appearing before me are senior and leading counsel themselves and are adroit in the art of pleading. Secondly, it baffles me to think that since the second defendant and the partners affirmed an affidavit through Chin Yoong Chong that they were making no allegation of actual bias against me and when counsel themselves equally expressed such sentiments, yet it would seem that in spite of such expressions of faith and trust in the court openly expressed by both litigant and counsel, a third party, being the notional fair-minded bystander or person sitting in the public gallery might feel that there would be a likelihood of bias. When the parties involved have unequivocally expressed a view that they fear no bias surely a person not involved in the proceedings and disinterested in its outcome cannot be seen to hold the view that there could be a reasonable likelihood of bias.

It is my judgment that the applicability of any one of the three tests expressed in the various cases decided in the Commonwealth cannot be used as a binding precedent. They can be a guide. This is because each case of alleged bias calling for a disqualification of a judge must depend on the facts relevant to each case. Acceding to the second defendant's application would mean that even before their appeal is heard, I have considered and accepted the possibility of a likelihood of bias. This claim of likelihood of bias emanates from the second defendant's belief that it is right in the opinion it holds with regard to the interpretation of my judgment. But that opinion is in question. This therefore, in my judgment, is not enough to require that the judge withdraw from the case. In my view, where the reason for requiring the disqualification itself is in contest, then such an application to disqualify the judge must be rejected. In *Bainton v Rajski* (1992) 29 NSWLR 539, Mahoney JA said at p 546:

> ... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by

A acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

Yet again in *R v Australian Stevedoring Industry Board & Anor* (1953) B 88 CLR 100, the High Court of Australia said at p 116:

> ... But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be 'real'. The officer must so have conducted himself that C a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that: 'preconceived opinions — though it is unfortunate that a judge should have any — do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded', per Charles J; *Reg v* D *London County Council; ex p Empire Theatre* ((1894) 71 LT 638 at p 639).

I therefore dismiss this application with costs.

Application dismissed with costs.

E Reported by Loo Lai Mee

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